Supreme Court of Pennsylvania.

SEELEY v. WELLES.

Where a person agrees to take a machine and try it, and, if it works to suit him, to buy it, he may reject it, though his objections may seem unreasonable to others, if his objection is made in good faith and is not merely capricious.

ERROR to Common Pleas of Bradford County.

Louis M. Hall and *I. McPherson* (*William T. Davies* with them), for plaintiff in error.

John N. Califf and *H. N. Williams* (*Elsbree & Williams* with them), for defendant in error.

CLARK, J. This suit was brought to recover the first instalment on an alleged contract for the sale of an Osborne reaper and binder. The principal controversy arises out of a disagreement as to the nature and terms of the contract. The plaintiff, on the one hand, alleges that the sale was absolute; that the machine was to be set up and tried, and was to work well, that it was put upon trial, and was accepted by Seeley; that the terms of the contract were fixed, and the time and manner of payment fully agreed upon. The defendant, on the other hand, maintains that he was to try the machine, and if it worked to suit him, and he could use it satisfactorily on his land, of which he was to be the judge, he was to take it upon the terms agreed upon; that upon trial it was not satisfactory, and he returned it to Welles. Both parties were to some extent corroborated by other witnesses, but the testimony was contradictory and conflicting; and it was for the jury to determine the true state of the facts.

In the general charge the learned judge of the Court below instructed the jury as follows: "If you believe the evidence on the part of the plaintiff, particularly of Espy and Bradley, as to what occurred at the hammock, then there was a complete contract, and the plaintiff would be entitled to recover. If, on the other hand, you believe the evidence on the part of the defendant, that he was to take the machine and try it, and that he was not to keep it unless it worked to his satisfaction, then the plaintiff cannot recover, provided you find that the machine did not work well, and that he had reasonable cause

to be dissatisfied with it. But if the machine did good work, he could not say, 'I have made a bad bargain; I am not satisfied,' and return the machine. In other words, there must have been a reasonable cause for his dissatisfaction, and the returning of the machine must have been in good faith. * * * There is a great disagreement in the testimony of the witnesses for the plaintiff and the defendant, upon this subject, and you will have to determine, from all this evidence, whether the working of the machine was such as to give Mr. Seeley reasonable cause to be dissatisfied with it, or whether it worked well, according to the agreement and warranty, as testified to by the plaintiff and his witnesses. You will now take this case and give it your careful consideration, and render such a verdict as will do justice between the parties."

In this instruction of the Court to the jury, we think there was error. If the defendant's theory of the case, on the facts, is accepted, it is plain that although the reaper may have worked well in the opinion of those who saw it, yet, if it did not work to the satisfaction of the defendant, he was not obliged to take it; he testifies that he told Espy he would not take the reaper until he tried it, and if it worked to suit him, and his team could handle it on his farm, he would buy it, and that he was to be the judge of this himself. He complains that it was too heavy; that it weighed nearly 200 pounds more than it had been represented to weigh; that his horses could not haul it; and that, in his judgment, it did not do the work well, etc. His objections to the reaper may have been ill founded; indeed, they may have been in some sense unreasonable, in the opinion of others; yet if they were made in good faith, he had a right, if his testimony is believed, to reject it. If he wanted a machine that was satisfactory to himself, not to other people, and contracted in this form, upon what principle shall he be bound to accept one that he expressly disapproved?

What the learned Court said to the jury on this point was equivalent to saying that although the reaper may have been wholly unsatisfactory to the defendant, yet if the jury thought he ought to have been satisfied, he was bound to take it; whereas, if the defendant's testimony is true, he was

to judge of the merits of the machine himself, not the by-standers, nor tne jury; and if he exercised his own judgment, in good faith, in the refusal to accept it, he was certainly not bound for the price.

The case is ruled by *Singerly* v. *Thayer*, 108 Pa. St. 291, where the authorities are collected, and the legal principles involved fully discussed. What has been said is of course applicable to the case only in the event that the jury in the re-trial of this case shall accept the defendant's theory as the correct one; for, if the evidence on the part of the plaintiff is believed, the contract was complete. Upon this question, as we have said, the testimony is conflicting. We have purposely refrained from any discussion of the facts, out of which the principles of law governing the case arise, fearing that any reference to the testimony, in detail, might have a misleading effect. It is of the highest importance, in such a case as this, that the jury should be left entirely free to consider and determine the facts upon their own judgment.

The judgment is reversed, and a *venire facias de novo* awarded.

CONTRACT TO FURNISH ARTICLES "TO SATISFACTION."

Where a person undertakes to manufacture an article or deliver goods which he guarantees shall be satisfactory to the buyer, the purchaser is sole judge whether the article is satisfactory, and there is no remedy left for the seller, where the purchaser is not satisfied: *McClure* v. *Briggs*, 58 Vt. 82.

In the case of *Silsby Manuf. Co.* v. *Chicago*, 24 Fed. Rep. 893, the Circuit Court of the United States (Dist. Cal. Sept. 7, 1885) says: "The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser it must be satisfactory to him, or he is not required to take it. It is not enough to be satisfied with the article; he must be satisfied, or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be judge; and if he deliberately enters into such an agreement, he must abide by it. To this effect, *Hallidie* v. *Sutter St. R. R. Co.*, 63 Cal. 575; *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray) 139; *Gibson* v. *Cranage*, 39 Mich. 49; *Wood Reaping Machine Co.* v. *Smith*, 50 Id. 565; *Heron* v. *Davis*, 3 Bosw. (N. Y.) 336; *Hoffman* v. *Gallaher*, 6 Daly (N. Y.) 42; *Gray* v. *Central R. R. Co.*, 11 Hun (N. Y.), 70.

Thus, where one undertakes, "to satisfaction," to make a suit of clothes, *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; to fill a particular place as agent, *Tyler* v.

Ames, 6 Lans. (N. Y.) 280; to mould a bust, *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; or paint a portrait, *Gibson* v. *Cranage*, 39 Mich. 49; *Hoffman* v. *Gallaher*, 6 Daly (N. Y.) 42; *Moore* v. *Goodwin*, 43 Hun (N. Y.), 534; he may not unreasonably expect to be bound by the opinion of his employer, honestly entertained; and neither the opposite party nor the jury can decide that he ought to be satisfied with the article made: *Moore* v. *Goodwin*, 43 Hun (N. Y.), 534. See *Wood Reaping and Mowing Machine Co.* v. *Smith*, 50 Mich. 565.

Thus, it has been held, that a contract to erect a patent hydraulic hoist, "warranted satisfactory in every respect," constitutes the purchaser sole judge of its fitness, and does not mean that it should be such as would satisfy other persons, or that the promisee reasonably ought to be satisfied with it: *Singerly* v. *Thayer*, 108 Pa. St. 291. And where the contract under which work is done provides for approval by a third party, no right to money earned or cause of action accrues until that party's certificate is procured: *Kirkland* v. *Moore*, 40 N. J. Eq. 106; *Tetz* v. *Butterfield*, 54 Wis. 242; *Oakwood Retreat Association* v. *Rathbone*, 65 Id. 177. But where the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not satisfied, the contract has been fully performed by the vendor, and the purchaser is bound to accept the article: *Silsby Manuf. Co.* v. *Chicago*, 24 Fed. Rep. 893, *supra*. Thus it was held in *Lynn* v. *Baltimore & O. R. R. Co.*, 60 Md. 404; s. c. 45 Am. Rep. 641, that on a contract by a corporation to purchase certain goods subject to inspection and approval by its agent, the corporation is liable if the agent fraudulently or in bad faith disapproves of the goods.

In Connecticut, in the case of *Zaleski* v. *Clark*, 44 Conn. 418; s. c. 26 Am. Rep. 446, where a sculptor undertook to furnish a bust to the satisfaction of the defendant, who refused to accept the work, when done, though in fact a fine piece of workmanship, the Supreme Court held that there could be no recovery. The Court say: "A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing: and undertaking to make one with which she will be satisfied is quite another thing. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it he is bound by it." See, also, *Gibson* v. *Cranage*, 39 Mich. 49; *Gray* v. *Central R. R. Co. of N. J.*, 11 Hun (N. Y.), 70.

The case of *Zaleski* v. *Clark*, *supra*, is founded upon *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray) 139.

In Massachusetts, in a case where the plaintiff undertook to make a bookcase for a society, which was to be "to the satisfaction" of the president, the Court say: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief:" *McCarren* v. *McNulty*, 73 Mass. (7 Gray) 139. And this case was subsequently followed in *Brown* v. *Foster*, 113 Mass. 139; s. c. 18 Am. Rep. 463, where the court say: "Although the compensation of the plaintiff for valuable service and materials

may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered."

In Michigan, in the case of *Wood Reaping and Mowing Machine Co.* v. *Smith*, 50 Mich. 555, which was a suit for the contract price of a machine warranted to be satisfactory to the defendant, it was held that "a stipulation in a contract of sale that it shall be of no effect unless the goods are satisfactory, is to be construed, according to the circumstances, as reserving to the promisor the absolute right to reject them without giving any reason, or as binding him to decide on fair and reasonable grounds. In one case, his conclusion cannot be reviewed, but it can be in the other." The Court say that "the cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction. In the one class, the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course; and all right to inquire into the grounds of his action and overhaul its determination is absolutely excluded from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option and is not willing to leave his freedom of choice exposed to any contention, or subject to any contingency. He is resolved to permit no right in any one else to judge for him, or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain upon the condition of reserving the power to do what others might regard as reasonable. The following cases sufficiently illustrate the instances of the first class: *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray) 139; *Gibson* v. *Cranage*, 39 Mich. 49; *Hart* v. *Hart*, 22 Barb. (N. Y.) 606; *Tyler* v. *Ames*, 6 Lans. (N. Y.) 280; *Rossiter* v. *Cooper*, 23 Vt. 522; *Taylor* v. *Brewer*, 1 Maule & Sel. 290. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness, and the adequacy of the grounds of it, are open considerations, and subject to the judgment of judicial triers."

Among the cases applying to this class are, *Daggett* v. *Johnson*, 49 Vt. 345, and *Hartford Manufacturing Co.* v. *Brush*, 43 Vt. 528.

In New York, where the plaintiff

repaired and set up the boilers for the defendant, under the contract that he was not to be paid, until the defendants were satisfied that the "boiler as changed was a success," defendants claimed that they alone were to determine the question whether they were satisfied that the boiler as changed was a success. The Court held that this was error, where the work was completed according to contract, and the defendants used it without objection or complaint. The time for payment had come and the plaintiff had a right of action for the contract price in case payment was refused. The reason upon which this was founded seems to be, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with:" *Duplex Safety Boiler Co.* v. *Garden*, 101 N. Y. 387; s. c. 54 Am. Rep. 709. In *Folliard* v. *Wallace*, 2 Johns. (N. Y.) 395, W. covenanted that, in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. $150 three months after he should be "well satisfied" that the title was undisputed. Upon suit brought, the defendant set up that he was "not satisfied," and the plea was held bad, the Court saying: "A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded."

This decision was followed in *Miesell* v. *Globe M. L. Ins. Co.*, 76 N. Y. 115, and *Brooklyn* v. *Brooklyn R. R. Co.*, 47 Id. 475.

In Pennsylvania, it was held, in the recent case of *Singerly* v. *Thayer*, 108 Pa. St. 291, that a contract to furnish an article which shall be satisfactory to the purchaser, is not complied with by proof that the article furnished is made in a workmanlike manner, and performs its intended purpose in a manner which ought to be satisfactory to the purchaser. The contract in this case was to erect an elevator "satisfactory in every respect," and the Court held the meaning of the language used to be that the elevator, when erected, should prove satisfactory to the person for whom it was erected. As a matter of fact the elevator did not prove satisfactory, and suit was brought on the contract for the price. The Court say: "When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove that he ought to have been satisfied. It was so where the contract was for the purchase of a steamboat:" *Gray* v. *Central R. R. Co. of N. J.*, 11 Hun (N. Y.), 70; where the agreement was to make a suit of clothes: *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; on a contract for a plaster bust of the deceased husband of the defendant: *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; where a portrait was to be satisfactory to the defendant: *Gibson* v. *Kranage*, 39 Mich. 42; and where a portrait of defendant was to be satisfactory to his friends: *Hoffman* v. *Gallaher*, 6 Daly (N. Y.), 42.

In Vermont, in the case of *McClure* v. *Briggs*, 58 Vt. 82, where A. set up an organ in B.'s house, upon an agreement that B. should keep it and pay for it, if it proved satisfactory to him, B. thought without cause, that he was dissatisfied, and notified A. The Court held that, provided he acted in good faith, he was the sole judge as to his satisfaction with the organ. The Court say: "He was bound to act honestly, and to give the instrument a fair trial, and such as the

seller had a right, under the circumstances, to expect he would give it, and herein to exercise such judgment and capacity as he had, for, by the contract, he was the one to be satisfied, and not another for him. If he did this, and was still dissatisfied, and that dissatisfaction was real and not feigned, honest and not pretended, it is enough, and plaintiffs have not fulfilled their contract, and all these elements are gatherable from the report. This is the doctrine of *Daggett* v. *Johnson*, 49 Vt. 345, and of *Hartford Manufacturing Co.* v. *Brush*, 43 Id. 528. In the former case, the defendant was required to bring to the trial of the evaporator only honesty of purpose and judgment according to his capacity, to ascertain his own wishes, and was not required to exercise even ordinary skill and judgment in making his determination. The case turned on an error in the admission of testimony, but Judge REDFIELD goes on to discuss the merits of the case, somewhat following substantially in the line of Brush's case, and citing it as authority. But *Daggett* v. *Johnson* is distinguishable in its facts from Brush's case and from this case in that the defendant omitted to test the pans in the very respect in which he knew it was claimed their excellence consisted."

In Wisconsin, in the case of *Tetz* v. *Butterfield*, 54 Wis. 242, it is said, that where a building contract provides for the acceptance of the architect, evidence is admissible to show that he acted collusively and in bad faith. And in *Glasius* v. *Black*, 50 N. Y. 145, where by the terms of a contract for repairing a building it was provided that the materials to be furnished should be of the best quality and the workmanship performed in the best manner, subject to the acceptance or rejection of the architect, and all to be in strict accordance with the plans and specifications, the work to be paid for "when completely done and accepted," it was held that the acceptance by the architect did not relieve the contractors from their agreement to perform the work according to the plans and specifications; nor did his acceptance of a different class of work, or inferior materials, from those contracted for, bind the owner to pay for them; that the provision for acceptance was merely an additional safeguard against defects not discernible by an unskilled person. And in the recent case of *Oakwood Retreat Association* v. *Rathbone*, 65 Wis. 177, it was held that when a contract provides for the performance of work at a stipulated price, to the satisfaction of an architect named therein, who is employed to adjust all claims of the parties to the agreement, and a bond is given to secure a faithful performance of the contract, where the party agreeing to do the work does not fully perform such contract, the other party may sue the principal and sureties on the bond for a breach of the contract, before the architect has adjusted any claim arising out of the breach.

JAMES M. KERR.

Rochester, N. Y.